

No. 05- **05-535** OCT 24 2005

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In The
Supreme Court of the United States

EVER HIGGINS,

Petitioner,

v.

TYSON FOODS, INC.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under what circumstances, if any, may a plaintiff establish the existence of invidious discrimination in employment by adducing evidence that he or she was better qualified than the individual selected for a disputed position?*

* The same question is presented in *Ash v. Tyson Foods, Inc.*, No. 05-379.

LIST OF PARTIES

The parties to this action are set forth in the caption.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Opinions Below	1
Statement of Jurisdiction.....	1
Statutes Involved.....	1
Statement of the Case.....	2
Reason for Granting the Writ.....	8
There Is A Widespread Conflict Among the Cir- cuit Courts Regarding When, or Indeed Whether, Evidence Regarding Comparative Qualifications Can Be Utilized To Prove Invidious Discrimina- tion in Employment	8
Conclusion	20

APPENDIX

Opinion of the U.S. Court of Appeals for the Elev- enth Circuit, filed April 15, 2005	1a
Memorandum of Decision of the District Court of the Northern District of Alabama, filed Septem- ber 2, 2004	2a
Order on Rehearing from the U.S. Court of Appeals for the Eleventh Circuit, filed July 25, 2005	112a
District Court Decisions in the Eleventh Circuit Applying the "Slap in the Face" Standard.....	114a
District Court Decisions in the Fifth Circuit Apply- ing the "Slap in the Face"/"Cry Out" Standard	117a

TABLE OF AUTHORITIES

	Page
CASES	
<i>Aka v. Washington Hosp. Center</i> , 156 F.3d 1284 (D.C. Cir. 1998) (en banc).....	18, 19
<i>Alexander v. Fulton County, Ga.</i> , 207 F.3d 1303 (11th Cir. 2000)	<i>passim</i>
<i>Bullington v. United Air Lines, Inc.</i> , 186 F.3d 1301 (10th Cir. 1999)	14
<i>Carberry v. Monarch Marking Systems, Inc.</i> , 30 Fed. Appx. 389 (6th Cir. 2002).....	18
<i>Carter v. George Washington University</i> , 387 F.3d 872 (D.C. Cir. 2004).....	19
<i>Carthon v. Johnson Controls Inc.</i> , 100 Fed. Appx. 993 (5th Cir. 2004).....	13
<i>Cheney v. U.S. Oncology</i> , 34 Fed. Appx. 962 (5th Cir. 2002)	12
<i>Clark v. Alfa Insurance Co.</i> , 2002 WL 32366291 (N.D. Ala., May 28, 2002).....	10
<i>Cofield v. Goldkist, Inc.</i> , 2001 WL 1159775 (11th Cir. Ala. Oct. 2, 2001).....	3
<i>Cofield v. Goldkist, Inc.</i> , 267 F.3d 1264 (11th Cir. 2001)	5, 6, 7, 9, 10
<i>Cook v. Mississippi Department of Human Services</i> , 108 Fed. Appx. 852 (5th Cir. 2004)	12, 13
<i>Cooper v. Southern Co.</i> , 390 F.3d 695 (11th Cir. 2004)	9

TABLE OF AUTHORITIES – Continued

	Page
<i>Cowan v. Unified School District 501</i> , 316 F. Supp. 2d 1061 (D. Kan. 2004).....	3, 14
<i>Deines v. Texas Dep't of Protective & Regulatory Serv.</i> , 164 F.3d 277 (5th Cir. 1999).....	3, 5, 6, 7, 13
<i>Denney v. City of Albany</i> , 247 F.3d 1172 (11th Cir. 2001)	3, 6, 9
<i>Edwards v. Principi</i> , 80 Fed. Appx. 950 (5th Cir. 2003)	13
<i>E.E.O.C. v. Louisiana Office of Community Services</i> , 47 F.3d 1438 (5th Cir. 1995)	12, 13
<i>Glenn's Trucking Co. v. N.L.R.B.</i> , 298 F.3d 502 (6th Cir. 2002)	18
<i>Godwin v. Hunt Wesson, Inc.</i> , 150 F.3d 1217 (9th Cir. 1998)	15
<i>Goodman v. Georgia Southwestern</i> , 2005 WL 2136910 (11th Cir., Sept. 6, 2005).....	9
<i>Grantham v. Albemarle Corp.</i> , 244 F.3d 137 (5th Cir. 1999)	13
<i>Haas v. Betz Laboratories, Inc.</i> , 1999 WL 451206 (9th Cir. June 23, 1999).....	15
<i>Hall v. Alabama Association of School Boards</i> , 326 F.3d 1157 (11th Cir. 2003)	9
<i>Hithon v. Tyson Foods</i> , 2005 WL 1820041 (11th Cir., Aug. 3, 2005).....	10
<i>Jenkins v. Ball Corp.</i> , 2005 WL 1515486 (5th Cir. June 28, 2005)	13
<i>Jenkins v. Nashville Public Radio</i> , 106 Fed. Appx. 991 (6th Cir. 2004).....	17

TABLE OF AUTHORITIES – Continued

	Page
<i>King v. Healthrider, Inc.</i> , 1999-WL 825122 (6th Cir. Oct. 8, 1999).....	18
<i>Kitchen v. Burlington Northern and Santa Fe Railway Co.</i> , 298 F. Supp. 2d 1193 (D. Kan. 2004)	14
<i>Lall v. Perot Systems Corp.</i> , 2004 WL 884438 (N.D. Tex. April 23, 2004)	13
<i>Lathram v. Snow</i> , 336 F.3d 1085 (D.C. Cir. 2003)	19
<i>Lee v. GTE Florida Inc.</i> , 226 F.3d 1249 (11th Cir. 2000)	<i>passim</i>
<i>Lindahl v. Air France</i> , 930 F.2d 1434 (9th Cir. 1991)	16
<i>Margolis v. Tektronix, Inc.</i> , 44 Fed. Appx. 138 (9th Cir. 2002)	15, 16
<i>Odima v. Westin Tucson Hotel</i> , 53 F.3d 1484 (9th Cir. 1995)	14, 17
<i>Odima v. Westin Tucson Hotel Co.</i> , 991 F.2d 595 (9th Cir. 1993)	16
<i>Odom v. Frank</i> , 3 F.3d 839 (5th Cir. 1993).....	11, 12, 13, 14
<i>Patterson v. McLean Credit Union</i> , 491 U.S. 164 (1989)	19, 20
<i>Price v. Federal Express Corp.</i> , 283 F.3d 715 (5th Cir. 2002)	12, 13, 17
<i>Raad v. Alaska State Commission for Human Rights</i> , 86 P.3d 899 (Alaska 2004)	15
<i>Raad v. Fairbanks North Star Borough School District</i> , 323 F.3d 1185 (9th Cir. 2003)	14, 15

TABLE OF AUTHORITIES – Continued

	Page
<i>Sanders v. Anadarko Petroleum Corp.</i> , 108 Fed. Appx. 139 (5th Cir. 2004)	13
<i>Scott v. University of Mississippi</i> , 148 F.3d 493 (5th Cir. 1998)	11, 12, 13
<i>Snoddy v. City of Nacogdoches</i> , 98 Fed. Appx. 338 (5th Cir. 2004)	13
<i>Stewart v. Ashcroft</i> , 352 F.3d 422 (D.C. Cir. 2003)	19
<i>Taylor v. Runyon</i> , 175 F.3d 861 (11th Cir. 1999)	10
<i>Texas Dept. of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981)	18
<i>Thomas v. California State Department of Corrections</i> , 1992 WL 197414 (9th Cir. Aug. 18, 1992)	16
<i>Timmermeyer v. Wichita Eagle and Beacon Publishing Co., Inc.</i> , 90 F. Supp. 2d 1200 (D. Kan. 2000)	14
<i>Tucevich v. State of Nevada</i> , 1999 WL 62735 (9th Cir. Jan. 22, 1999)	15, 16
<i>Walker v. Prudential Property and Casualty Insurance Co.</i> , 286 F.3d 1270 (11th Cir. 2002)	9
<i>Willie v. Wharton County Junior College</i> , 33 Fed. Appx. 705, 2002 WL 432990 (5th Cir. 2002)	13
<i>Wilson v. B/E Aerospace, Inc.</i> , 376 F.3d 1079 (11th Cir. 2004)	9
<i>Wu v. Thomas</i> , 847 F.2d 1480 (11th Cir. 1988)	11
<i>Zambetti v. Cuyahoga Community College</i> , 314 F.3d 249 (6th Cir. 2002)	18

TABLE OF AUTHORITIES - Continued

	Page
STATUTES:	
28 U.S.C. § 1254(1)	1
42 U.S.C. § 2000e-2(a)(1).....	1
42 U.S.C. § 1981	2

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ever Higgins respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on April 15, 2005.

OPINIONS BELOW

The April 15, 2005 opinion of the court of appeals, which is reported at 143 Fed. Appx. 300 (Table) (11th Cir. 2005), is set out at p. 1a of the Appendix. The July 25, 2005 order of the court of appeals, which is not officially reported, is set out at pp. 112a-113a. The September 2, 2004 memorandum decision of the district court, which is not officially reported, is set out at pp. 2a-111a.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on April 15, 2005. A timely petition for rehearing was denied on July 25, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 703(a)(1) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part:

- It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such

individual's race, color, religion, sex, or national origin.

Section 1981 of 42 U.S.C. provides in pertinent part:

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .

(b) For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

STATEMENT OF THE CASE

This case concerns a promotion decision that was made in the summer of 2000 to the position of Complex Human Resources Manager at the Oxford, Alabama regional complex office of Tyson Foods. At the time petitioner, Ever Higgins, an African American female and 49 years of age, was a managerial employee in human resources at the complex level. The position was ultimately awarded to Lisa Burdick, white female and 28 years of age. Plaintiff sued alleging discrimination on the basis of her age and race.

After a period of discovery, Tyson moved for summary judgment arguing that Higgins must "adduce evidence that the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." (Doc. 44, p. 37) (boldface and underline in original).

Tyson relied on Eleventh, Tenth, and Fifth Circuit case law.¹ Higgins, in her opposition, submitted evidence on a range of conflicting issues, but most important was conflicting evidence regarding whether Higgins clearly was better qualified than Burdick and whether Burdick even met the minimum qualifications for the position.

There was substantial evidence that Higgins was far better qualified than Burdick. Higgins was Burdick's supervisor for over a year and had trained Burdick in human resources. (Doc. 44, Ex. D, pp. 20-21; Ex. F, pp. 50-51, 56; Pls. Exs. 1, 3, 4). Allan Trotter, the Complex Human Resource Manager, told Higgins, as human resource manager, to "take her [Burdick] and use her however you can, train her what to do." (Doc. 44, Ex. F, p. 51).

In the evidence submitted to the district court was an extensive list of Higgins' job duties and responsibilities compared to those of Burdick during their respective tenure with Tyson. Higgins also relied on the job posting for the human resource position which provided the minimum qualifications. (Doc. 44, Ex. F, Pls. Exs. 5, 7). Higgins greatly exceeded the minimum qualifications. (Doc. 44, Ex. F., p. 105).² Higgins pointed to her fifteen years of management experience in the field of Human

¹ *Cofield v. Goldkist, Inc.*, 2001 WL 1159775 (11th Cir. Ala. Oct. 2, 2001) (emphasis added) citing *Denney v. City of Albany*, 247 F.3d 1172 (11th Cir. 2001) quoting *Lee v. GTE Florida Inc.*, 226 F.3d 1249, 1253-54 (11th Cir. 2000); accord, *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1339-1340 (11th Cir. 2000) (all quoting *Deines v. Texas Dep't of Protective & Reg. Servs.*, 164 F.3d 277, 280 (5th Cir. 1999)).

² Allan Trotter, Complex Human Resource manager, testified that the Complex position requires three to five years of management experience not merely time with the company. (Doc. 44, Ex. F., pp. 5, 61-64).